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No. 87-605

In The
Supreme Court of the United States
October Term, 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and Dr. NOA EMMETT AUWAE ALULI,

Petitioners,

v.

HAWAII BOARD OF LAND AND NATURAL RESOURCES, ESTATE OF JAMES CAMPBELL and TRUE/MID PACIFIC GEOTHERMAL VENTURES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

RESPONDENT HAWAII BOARD OF LAND AND NATURAL RESOURCES' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state land use permit authorizing private geothermal development on private land, upon which petitioners have never conducted any religious ceremonies, violates petitioners' First Amendment rights freely to exercise their native Hawaiian religion?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

RESPONDENT HAWAII BOARD OF LAND AND NATURAL RESOURCES' BRIEF IN OPPOSITION

The State of Hawaii Board of Land and Natural Resources, Respondent in this Court, respectfully prays that the Petition for Certiorari to review the judgment of the Supreme Court of Hawaii entered July 14, 1987, be denied.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 740 P.2d 28 (Haw. 1987), and is reprinted in Petitioners' Appendix ("Pet. App.") "A." The findings of fact and conclusions of law of the State of Hawaii Board of Land and Natural Resources are not reported and are reprinted in part in Pet. App. "B."

JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on July 14, 1987, and the Petition for Certiorari, invoking 28 U.S.C. § 1257(3) as the basis for review, was timely filed on October 13, 1987.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part that

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The Fourteenth Amendment to the Constitution provides in relevant part that

> No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Act 296, Session Laws of Hawaii 1983, as amended by Act 151, Session Laws of Hawaii 1984, now codified in Hawaii Revised Statutes, sections 205-5.1 and 205-5.2, which authorizes and directs the Board of Land and Natural Resources to evaluate and designate geothermal resource subzones throughout the State, is reprinted in Appendix ("App.") "A."

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STATEMENT OF THE CASE

This case arises out of the first effort by the State of Hawaii to plan and regulate geothermal development on the Big Island of Hawaii in order to reduce the State of Hawaii's present dependence upon imported fossil fuel for more than ninety percent of its energy needs.

1. In 1983 Hawaii's legislature adopted Act 296, Session Laws of Hawaii 1983, and, in 1984, amended it by Act 151, Session Laws of Hawaii 1984, *codified,* Haw. Rev. Stat. § 205-5.1 and 205-5.2. Act 296 as amended directs the Hawaii Board of Land and Natural Resources ("Board") to assess the entire State, on a county-by-county basis, for geothermal potential and to designate "geothermal resource subzones" in those areas that best demonstrate an an acceptable balance among seven specific factors set forth at Haw. Rev. Stat. § 205-5.2 (b), App. "A," *infra,* at A3-4. In adopting this law, our Legislature found that "development and exploration of Hawaii's geothermal resources is of statewide concern, and that this interest must be balanced with interests in preserving Hawaii's unique social and natural environment." Act 296, § 1, 1983 Haw. Sess. L. 636. The law "provide[s] a policy that will assist in the location of geothermal resources development in areas of the lowest potential environmental impact," *id.,* and requires the Board to consider "[s]ocial and environmental impacts[.]" Haw. Rev. Stat. § 205-5.2(b)(4) (1985). This mandate runs concurrently with the Board's powers under Hawaii's statewide land use classification and management schemes, Haw. Rev. Stat. chs. 171, 183, and 205.

2. In 1982, before the Board enjoyed specific regulatory power under Acts 296 and 151, the Estate of James

Campbell,[1] and True/Mid-Pacific Ventures, co-respondents here, petitioned the Board under its existing regulatory programs under Chapter 183, Haw. Rev. Stat., for a Conservation District Use Permit to develop geothermal energy at Kahauale'a, Puna, Hawaii, south of Hilo and adjacent to the Hawaii Volcanoes National Park in the eastern portion of the Big Island of Hawaii. This petition triggered the first of four separate "contested cases" before the Board under the Hawaii Administrative Procedures Act, Haw. Rev. Stat. ch. 91. Pet. App. B at 41-50 (summarizing the four-year hearing process). The first two cases, involving the Estate's initial application at Kahauale'a in the Kilauea upper east rift zone, were mooted when the Estate and the State of Hawaii concluded an agreement on December 27, 1985, exchanging 27,644 acres of land owned by the State in the Kilauea middle east rift zone ("KMERZ") for more than 25,000 acres of land the Estate originally sought to develop. The new land the Estate received is 10 to 15 miles away from and downrift of the environmentally sensitive and historically important Hawaii Volcanoes National Park. Under the terms of the exchange, the State of Hawaii retains the underlying mineral rights pertaining to the KMERZ parcel, *e.g.*, rights to underground steam. *Dedman v. Board of Land and Natural Resources*, 740 P.2d 28, 31 (Haw. 1987), Pet. App. 11-12. The Estate obtains surface rights, including the rights to invoke Hawaii's remedies of trespass and ejectment, subject to a covenant "that the use and enjoyment of the land conveyed shall not be in support of any

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[1] The Estate is one of the largest landowners in Hawaii, which has one of the strongest land oligopolies in the Nation. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232 (1984).

policy which discriminates against anyone based upon race, creed, color or national origin'' and subject to the rights of native tenants. *Id.*

3. The land exchange led to the third and fourth cases under Chapter 91. In the third case, the Board, acting pursuant to its affirmative mandate under Acts 296 and 151, designated 9,014 acres in the KMERZ as a geothermal resource subzone. In the fourth case, the Board granted Campbell Estate a Conservation District Use Permit to explore for up to 100 megawatts, and to develop up to 25 megawatts of geothermal energy. *See Dedman,* 740 P.2d at 31, Pet. App. 12. Petitioners, Ralph Palikapu O Kamahoali'i Dedman, and Dr. Noa Emmett Auwae Aluli, presented testimony in these proceedings that decisions by the Board favorable to the Estate would give rise to generalized ''spiritual harm'' and desecration of the physical manifestations of their Native Hawaian goddess Pele, which include ''volcanic activity, i.e., heat, steam, magma, as well as the surrounding landscape, i.e., ferns, shrubs, land and even the rain.'' *Dedman,* 740 P.2d at 31, Pet. App. at 12. The Board heard extensive testimony on the impact of the proposed geothermal activities on petitioners' religious practices and interpreted the statutory duty to consider social impacts to include consideration of petitioners' religious interests and First Amendment claims. *Cf. Ohio Civil Rights Commission v. Dayton Christian School,* 106 S. Ct. 2718, 2724 (1986). Petitioners acknowledged that neither they nor any of their witnesses '' 'ever conducted or participated in religious ceremonies on this land.' '' 740 P.2d at 33, Pet. App. at 21. Nor did petitioners make any showing that '' 'tapping this heat source from the earth has diminished or negatively

affected the eruptive nature of Kilauea Volcano.' " *Id.* Following the Board's decisions in favor of geothermal development, petitioners took a direct appeal to the Supreme Court of Hawaii under the provisions of Haw. Rev. Stat. § 205-5.1(f).

4. On appeal, the Supreme Court of Hawaii affirmed over petitioners' claims under the Free Exercise Clause. Rejecting petitioners' broad claims, which would have the effect of blocking geothermal development anywhere in the State of Hawaii, the Supreme Court of Hawaii accepted without challenge that petitioners' Native Hawaiian beliefs about Pele were sincere and "religious" within the meaning of the Free Exercise Clause, but held that, because petitioners could not show "a 'substantial burden' on religious interests[,]" their Free Exercise Clause claims failed. *Dedman,* 740 P.2d at 33, Pet. App. at 21.

The state court relied directly upon this Court's opinion in *Bowen v. Roy,* 106 S. Ct. 2147 (1986), which rejected the claim by Native American parents that the mandatory use of a Social Security number for their daughter, Little Bird of the Snow, "harm[ed] [their] daughter's spirit." *Id.* at 2152, *cited,* 740 P.2d at 32, 33, Pet. App. at 17, 24. As in *Roy,* the Supreme Court of Hawaii reasoned that, when only generalized "spiritual" harm is shown, the Free Exercise Clause simply "does not afford an individual a right to dictate the conduct of the Government's internal procedures." 106 S. Ct. at 2152. The Supreme Court of Hawaii also reasoned that the Board, even if it did not have the right to permit geothermal development everywhere, had permissibly exercised its power here after making substantial accommodations to petitioners' beliefs by

"[m]oving the project away from the volcanic phenomena associated with Pele," *Dedman,* 740 P.2d at 33, Pet. App. at 23-24.

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REASONS FOR DENYING THE WRIT

I. The Hawaii Supreme Court Did Not Misapply This Court's First Amendment Free Exercise Decisions.

The Supreme Court of Hawaii, following the standard established by this Court in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), examined first the legitimacy and sincerity of petitioners' beliefs, which neither the Board nor the Estate challenged. Following *Bowen v. Roy,* 106 S. Ct. 2147, 2152 (1986), the state court noted the long-recognized distinction between freedom of individual belief, which is absolute, and freedom of individual conduct, which is not absolute. Then, applying *Thomas v. Review Board, Indiana Employment Security Division,* 450 U.S. 707, 717-718 (1981), the court examined the coercive effect or the burden upon petitioners that might result from the proposed activities and found none. The court, like the Board, found that the approval of the geothermal plant did not regulate or directly burden petitioners' religious beliefs or religious speech. *Dedman,* 740 P.2d at p. 32, Pet. App. at p. 19. Referring next to *Bowen,* 106 S. Ct. at 2153-54, the Hawaii court found that the Board's actions did not compel petitioners by threat of sanction to refrain from religiously motivated conduct or to engage in conduct objectionable to religious belief. Finally, the lower court, as this Court had in *Yoder,* 406 U.S. at 218, looked at petitioners' claim that the Board's action would infringe upon their religious

practices. Observing that "[n]either of the [petitioners] nor any of the witnesses testified that they had ever conducted or participated in religious ceremonies on this land" and that "[t]here is no indication that tapping the heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano", *Dedman*, 740 P. 2d at 33, Pet. App. at 21, the Hawaii court could not find evidence of the kind of objective harm the Free Exercise clause is designed to prevent. *Id.*

Petitioners rely upon *Sherbert v. Verner*, 374 U.S. 398 (1963), to argue that the Hawaii court should have instead applied a test which provides that if the "primary effect" of a government action "impermissibly infringes upon religion," then the government activity violates the Free Exercise clause. But there is nothing in any of this Court's opinions, let alone *Sherbert*, to indicate that such a test would lead to a different result. In *Sherbert* this Court held simply "that South Carolina may not constitutionally apply the [unemployment compensation] eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." 374 U.S. at 410. Unlike the appellant in *Sherbert*, the petitioners here are not being threatened with a choice between their religious beliefs and government benefits. They are not seeking government benefits in a traditional sense[2] and the Board's

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[2] The purportedly coercive injury of which petitioners complain is the failure of the State to exercise *its* coercive regulatory authority to restrain *others* from taking private action that has the effect of offending petitioners' beliefs. This claim, unlike claims directed to nondiscretionary benefit programs, strikes at the heart of the Executive's traditional prerogatives. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809-10 (1984).

decision and order does not address or coercively implicate petitioners in any direct and objective way.

Petitioners argue that "[i]n this case there exists pressure to modify [their] behavior and to violate [their] beliefs." Petition at 28. They then argue, without explanation, and as if all volcanic land or at least all of the Kilauea east rift zone would be affected by this project, that "[g]eothermal development would destroy Native Hawaiian practitioner access to and use of sacred land which is the sine qua non of Pele religious practice. . . ." *Id.* But petitioners offer no evidence to substantiate any of these offensive effects. There is nothing in the record to show how or why a private project on private land to which they have no right of access, and upon which they have never in the past conducted ceremonies, will cause an "impermissible infringement" under *Sherbert*. Some land will be affected, but only a very small portion of the KMERZ and none of the lands where these petitioners have ever practiced their religion in the past. The approved project proposes to use up to 300 acres, less than three percent of the 9,014 acres in the KMERZ, which is only a portion of Campbell Estate's 27,000 acre parcel along the 25 mile Kilauea east rift on the lower eastern slope of Mauna Loa, a massive volcanic formation rising 13,680 feet above sea level.

What petitioners really complain about is the knowledge that this project exists. Redressing this "injury" would require a novel extension of the Free Exercise Clause, and would mean that any person's honest conviction, standing alone, would be sufficient to require the state to show a compelling governmental interest to justify

what are, in essence, zoning decisions. This has never been the law. As Judge Learned Hand wisely stated, and as this Court has on many occasions agreed:

> The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their own conduct to his religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953), *quoted in part, Estate of Thorton v. Caldor, Inc.* 472 U.S. 703, 710 (1985).

Petitioners argue *Sherbert, supra,* provides the standard that the Supreme Court of Hawaii should have but did not follow and that under *Sherbert* one need not establish the degree and severity of the burden as a precondition to requiring the state to show a compelling need. But in *Sherbert* the loss was very measurable: appellants there were forced to work on a holy day or lose weekly unemployment benefits. Likewise, in *Yoder,* the State of Wisconsin sought to compel Amish children to attend a school system whose teachings were inconsistent with the entire Amish way of life. *Cf. Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 487 n.22 (1982) (burdens that must be shown even to invoke Article III standing under the Establishment Clause). Because neither the Board nor the Hawaii court below could discover any coercive burden, it is clear even under petitioners' proposed test that the lower court was correct.

The ultimate answer to Petitioners' claim is set forth in the majority opinion in *Bowen v. Roy,* 106 S. Ct. 2147,

2152 (1986). If it is true that a "sincere religious objection" to the use of a Social Security number cannot force the government to provide compelling justification for its use of this proprietary device, so, too, it cannot be that the State of Hawaii need provide "compelling" reasons for permitting geothermal development on private land even if the underlying steam belongs to the State, and, as we concede, even if petitioners truly believe that geothermal development will desecrate some of the manifestations of the Pele religion. *See id.; see also* 106 S. Ct. at 2159 (Blackmun, J., concurring in part); *id.* at 2165 (O'Connor, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part). Indeed, the Board took numerous affirmative steps, and established a variety of conditions in its decision and order, to accommodate petitioners' religious practices.[3] "[B]y virtue of the land exchange, the proposed development site will be an additional 5 to 10 miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside." 740 P.2d at 33, Pet. App. 23. To say that, despite these accommodations, the Board and the Court below violated this Court's interpretation of the Free Exercise Clause would defy any plausible reading of this Court's precedents.[4]

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[3] Petitioners do not reprint the extensive portions of the Board's decision and order of April 11, 1986, which require, among other things, extensive archeological surveys before any ground activity is established in the KMERZ. *See* Decision and Order, CDUA-HA 12/20/85-1830 at 1-25, *reprinted in* 17 Record on Appeal, No. 11334 (Haw. record docketed June 27, 1986). Reference to these required studies is made at Pet. App. 59.

[4] To the extent *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688 (9th Cir. 1986), *cert. granted,*

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II. There is No Conflict between the Decision Below and Those of the Lower Courts, Including the Ninth Circuit's Decision in Northwest Indian Cemetery Protective Association v. Peterson, 795 F.2d 688 (9th Cir. 1986), cert. granted, 107 S. Ct. 1971 (U.S. May 4, 1987).

Apparently relying on this Court's Rule 17.1(b), petitioners seek to establish the basis for review upon a perceived conflict with the Ninth Circuit's decision in *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688 (1986), *cert. granted*, 107 S. Ct. 1971 (U.S. May 4, 1987). There is no such conflict.[5] The *Northwest Indian Cemetery* case, currently before this Court *sub nom. Lyng v. Northwest Indian Cemetery Protective Association*, No. 86-1013, differs from the decision below in important ways, and presents no sound reason to grant the writ here.

In *Northwest Indian Cemetery*, the United States Forest Service sought to construct a replacement logging road

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107 S. Ct. 1971 (U.S. May 4, 1987), is to the contrary, it is clearly inconsistent with *Bowen*. Even if the Court would disagree with this characterization, however, *Northwest Indian* is wholly distinguishable from the instant case and any conflict between the Ninth Circuit's expansive view and that of the Supreme Court of Hawaii is more apparent than real. *See infra* pp. 12-15.

[5] Petitioners correctly recognize there is no conflict with any other decision of the lower courts. *See Dedman*, 740 P.2d at 33, Pet. App. 24-25 (citing *Inupiat Community of Arctic Slope v. United States*, 548 F Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984) (per curiam), *cert. denied*, 106 S. Ct. 68 (1985); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.) (per curiam), *cert. denied*, 464 U.S. 977 (1983)); Petition at 47 n.19 (citing *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980)).

on government land. 795 F.2d at 689. In this case, the State of Hawaii acting pursuant to its police powers considered and granted a zoning application by a private landowner to engage in a private project to develop geothermal energy underlying its surface estate. Unlike the public land in *Lyng*, access onto the land here involves the rights of the private landowner. Even the Ninth Circuit, we are confident, would be seriously troubled by Free Exercise claims that, if granted, would compel private landowners to yield up what, presumptively, are rights to use and enjoyment that are not restricted by Hawaii's unique land law, *see, e.g., Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982); Haw. Rev. Stat. § 7-1 (1985), or by valid exercises of the state's zoning or proprietary powers, *see, e.g., Dedman*, 740 P.2d at 31, Pet. App. at 12.

Moreover, in *Northwest Indian Cemetery*, the lower court found a well established and well documented history of actual use of the Chimney Rock section of the "high country" in issue. 795 F.2d at 692 & n.6, 693. The "Theodoratus Report" indicated that that particular land had in fact been used for generations for Native American religious practices. *Id.* In the present case, "it is uncontested that '[n]either of the [Petitioners] nor any of the witnesses ever conducted or participated in religious ceremonies on this land.' " *Dedman*, 740 P.2d at 33; Pet. App. A at 21.

Third, in *Northwest Indian Cemetery*, the lower court found that the "road building and logging operations would greatly impair religious exercises of the plaintiff Indians in the only place where they can be performed." 795 F.2d at 693. In this case, petitioners have practiced their religion in many places, but never on this land. The property that is the subject of the instant development permit simply

could not be indispensible in the same manner that the respondents in *Northwest* are claiming in the proceeding now before this Court. *See Dedman,* 740 P.2d at 33, Pet. App. at 23. Unlike *Northwest Indian Cemetery,* there is no specific religious practice associated with the particular geothermal resource underlying *this* land.

Finally, in *Northwest Indian Cemetery,* the Native American practioners identify specific geographic boundaries of the Blue Creek Unit in the high country, and thus provide some reasonable basis for limiting their claim. 795 F.2d at 691-693. In this case petitioners describe Pele's home as the entire area of active volcanism from the top of Mauna Loa through the Ka'u and Puna districts to the sea including the entire area of the Kilauea Volcano and the East and Southwest Rift Zones—in short, the entire eastern portion of the Big Island of Hawaii. Pet. App. at 53-54. This vast tract includes towns, residential and agricultural subdivisions, a military camp, existing geothermal wells, and a producing geothermal power plant that presently generates more than two megawatts of electricity. Pet. App. 57. Petitioners' virtually limitless claim,[6] which, if granted, would preclude geothermal energy development *anywhere* in the Fiftieth State, would constitute such an extraordinary interference with state land use authority

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[6] Characterizing petitioners' claims as limitless is simply another way of saying that, to make the analogy to *Northwest Indian Cemetery* work, petitioners must take this case far beyond the record presented. As this Court pointed out in *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842 (1984), "this Court reviews judgments, not opinions." "It is our duty to look beyond broad sweep of language and determine for ourselves precisely the ground upon which the [lower court] judgment rests." *Black v. Cutter Labratories,* 351 U.S. 292, 298 (1956). *See generally* this Court's Rule 17.1(b).

that not even the Ninth Circuit would countenance it. As this Court so recently reminded the lower courts, the Free Exercise Clause is not written " 'in terms of what the individual can extract from the government.' " *Bowen v. Roy,* 106 S. Ct. at 2152 (quoting *Sherbert v. Verner,* 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Not even the expansive ruling in *Northwest Indian Cemetery* would sanction the broad nullification of government prerogative that the petitioners demand.

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CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX A

Hawaii Revised Statutes (1985)

§ 205-5.1 *Geothermal resource subzones.* (a) Geothermal resource subzones may be designated within the urban, rural, agricultural, and conservation land use districts established under section 205-2. Only those areas designated as geothermal resource subzones may be utilized for geothermal development activities in addition to those uses permitted in each land use district under this chapter. Geothermal development activities may be permitted within urban, rural, agricultural, and conservation land use districts in accordance with this chapter. "Geothermal development activities" means the exploration, development, or production of electrical energy from geothermal resources.

(b) The board of land and natural resources shall have the responsibility for designating areas as geothermal resource subzones as provided under section 205-5.2; except that the total area within an agricultural district which is the subject of a geothermal mining lease approved by the board of land and natural resources, any part or all of which area is the subject of a special use permit issued by the county for geothermal development activities, on or before May 25, 1984, is hereby designated as a geothermal subzone for the duration of the lease. The designation of geothermal resource subzones shall be governed exclusively by this section and section 205-5.2, except as provided therein. The board shall adopt, amend, or repeal rules related to its authority to designate and regulate the use of geothermal resource subzones in the manner provided under chapter 91.

The authority of the board to designate geothermal resource subzones shall be an exception to those provisions of this chapter and of section 46-4 authorizing the land use commission and the counties to establish and modify land use districts and to regulate uses therein. The provisions of this section shall not abrogate nor supersede the provisions of chapters 182 and 183.

(c) The use of an area for geothermal development activities within a geothermal resource subzone shall be governed by the board within the conservation district and, except as herein provided, by state and county statutes, ordinances, and rules not inconsistent herewith within agricultural, rural, and urban districts, except that no land use commission approval or special use permit procedures under section 205-6 shall be required for the use of such subzones. In the absence of provisions in the county general plan and zoning ordinances specifically relating to the use and location of geothermal development activities in an agricultural, rural, or urban district, the appropriate county authority may issue a geothermal resource permit to allow geothermal development activities. "Appropriate county authority" means the county planning commission unless some other agency or body is designated by ordinance of the county council. Such uses as are permitted by county general plan and zoning ordinances, by the appropriate county authority, shall be deemed to be reasonable and to promote the effectiveness and objectives of this chapter. Chapters 177, 178, 182, 183, 205A, 226, 342, and 343 shall apply as appropriate. If provisions in the county general plan and zoning ordinances specifically relate to the use and location of geothermal development activities in an agricultural, rural, or urban district, the provisions shall require the appropriate county authority to conduct a public hearing and, upon appropriate request, a contested case hearing pursuant to chapter 91, on any application for a geothermal resource permit to determine whether the use is in conformity with the criteria specified in subsection (e) for granting geothermal resource permits.

(d) If geothermal development activities are proposed within a conservation district, then, after receipt of a properly filed and completed application, the board of land and natural resources shall conduct a public hearing and, upon appropriate request, a contested case hearing pursuant to chapter 91 to determine whether, pursuant to board regulations, a conservation district use permit shall

be granted to authorize the geothermal development activities described in the application.

[§ 205-5.2] *Designation of areas as geothermal resource subzones.* (a) Beginning in 1983, the board of land and natural resources shall conduct a county-by-county assessment of areas with geothermal potential for the purpose of designating geothermal resource subzones. This assessment shall be revised or updated at the discretion of the board, but at least once each five years beginning in 1988. Any property owner or person with an interest in real property wishing to have an area designated as a geothermal resource subzone may submit a petition for a geothermal resource subzone designation in the form and manner established by rules and regulations adopted by the board. An environmental impact statement as defined under chapter 343 shall not be required for the assessment of areas under this section.

(b) The board's assessment of each potential geothermal resource subzone area shall examine factors to include, but not be limited to:

(1) The area's potential for the production of geothermal energy;

(2) The prospects for the utilization of geothermal energy in the area;

(3) The geological hazards that potential geothermal projects would encounter;

(4) Social and environmental impacts;

(5) The compatability of geothermal development and potential related industries with present uses of surrounding land and those uses permitted under the general plan or land use policies of the county in which the area is located;

(6) The potential economic benefits to be derived from geothermal development and potential related industries; and

(7) The compatability of geothermal development and potential related industries with the uses permitted under sections 183-41 and 205-2, where the area falls within a conservation district.

In addition, the board shall consider, if applicable, objectives, policies and guidelines set forth in part I of chapter 205A, and the provisions of chapter 226.

(c) Methods of assessing the factors in subsection (b) shall be left to the discretion of the board and may be based on currently available public information.

(d) After the board has completed a county-by-county assessment of all areas with geothermal potential or after any subsequent update or review, the board shall compare all areas showing geothermal potential within each county, and shall propose areas for potential designation as geothermal resource subzones based upon a preliminary finding that the areas are those sites which best demonstrate an acceptable balance between the factors set forth in subsection (b). Once such a proposal is made, the board shall conduct public hearings pursuant to this subsection, notwithstanding any contrary provision related to public hearing procedures.

(1) Hearings shall be held at locations which are in close proximity to those areas proposed for designation. A public notice of hearing, including a description of the proposed areas, an invitation for public comment, and a statement of the date, time, and place where persons may be heard shall be published and mailed no less than twenty days before the hearing. The notice shall be published on three separate days in a newspaper of general circulation statewide and in the county in which the hearing is to be held. Copies of the notice shall be mailed to the department of planning and economic development, and the planning commission and planning department of the county in which the proposed areas are located.

(2) The hearing shall be held before the board, and the authority to conduct hearings shall not be delegated to any agent or representative of the board. All persons and agencies shall be afforded the opportunity to submit data, views, and arguments either orally or in writing. The department of planning and economic development and the county planning department shall be permitted to appear at every hearing and make recommendations concerning each proposal by the board.

(3) At the close of the hearing, the board may designate areas as geothermal resource subzones or announce the date on which it will render its decision. The board may designate areas as geothermal resource subzones only upon finding that the areas are those sites which best demonstrate an acceptable balance between the factors set forth in subsection (b). Upon request, the board shall issue a concise statement of its findings and the principal reasons for its decision to designate a particular area.

(e) The designation of any geothermal resource subzone may be withdrawn by the board of land and natural resources after proceedings conducted pursuant to the provisions of chapter 91. The board shall withdraw a designation only upon finding by a preponderance of the evidence that the area is no longer suited for designation; provided that the designation shall not be withdrawn for areas in which active exploration, development, production or distribution of electrical energy from geothermal sources is taking place.

(f) This Act shall not apply to any active exploration, development or production of electrical energy from geothermal sources taking place on June 14, 1983, provided that any expansion of such activities shall be carried out in compliance with its provisions.